Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

v.

BRADY CARTER,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a trial court's erroneous rejection of a charged offense without resolving against the government any of the factual elements of the offense constitute an acquittal under the Double Jeopardy Clause?

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JURISDICTION

Following this Court's grant, vacate, and remand for reconsideration in light of *Smith v. Massachusetts*, 543 U.S. 462 (2005), *see Carter v. Arkansas*, 126 S. Ct. 65 (2005), the Arkansas Supreme Court ruled that the Double Jeopardy Clause, as interpreted in *Smith*, foreclosed retrial of the respondent for aggravated robbery. App. at 10-17. On March 16, 2006, that court denied the State's petition for rehearing without comment in a letter order entered that date. App. at 24. The jurisdiction of this Court to review that double-jeopardy holding is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]"

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in pertinent part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

The respondent, Brady Carter, was tried to the bench before the Pulaski County Circuit Court on a charge of, *inter alia*, aggravated robbery. App. at 1-2. At the time the respondent was alleged to have committed the offense, Arkansas law provided that a person commits the offense of robbery if, "with the purpose of committing a felony or misdemeanor theft . . . [the person] employs or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a) (Repl. 1997). In turn, a person commits aggravated robbery "if he [or she] commits robbery as defined in § 5-12-102, and . . . [i]s armed with a deadly weapon . . . [or] [i]nflicts . . . serious physical injury upon another person." Ark. Code Ann. § 5-12-103(a) (Repl. 1997). In addition, the respondent was charged with battery in the first degree pursuant to Ark. Code Ann. § 5-13-201(a)(7) (Repl. 1997), or specifically, that "[w]ith the purpose of causing physical injury to another person, he cause[d] physical injury to any person by means of a firearm." Finally, the definition of "deadly weapon" included a firearm. Ark. Code Ann. § 5-1-102(4)(A) (Supp. 2001).

The State's evidence revealed that, on March 21, 2002, the respondent and three accomplices entered the home of the victim, Albert McVay, bound his wrists and taped his mouth with duct tape, and forced him at gunpoint to the respondent's home. There, they robbed him of $2,040 in cash that McVay had on his person. Throughout the ordeal, McVay was beaten severely, including being struck with the gun. App. at 3.

Following the State's case-in-chief, the respondent moved to dismiss the first-degree-battery charge in light of

a then-recent Arkansas Supreme Court decision, *Smith v. State*, 352 Ark. 92, 103, 98 S.W.3d 433, 440 (2003), which held that, in a first-degree-battery prosecution under Ark. Code Ann. § 5-13-201(a)(7), the phrase "by means of a firearm" means that the firearm must be used "as a firearm," that is, that the accused injure the victim by shooting, and not by merely using the firearm as a club. The State orally moved to amend the first-degree-battery charge to a lesser-included offense, and the trial proceeded.

After both sides had rested and delivered their closing arguments, the trial court found the respondent guilty on all counts, with the exception of aggravated robbery. Respecting that count, the trial court concluded that the evidence supported the aforementioned statutory elements, expressly finding that the respondent and his accomplices had committed a theft against McVay while armed with a gun and had caused serious physical injury to McVay during the criminal episode. App. at 5. Nonetheless, the trial court did not convict the respondent of aggravated robbery, concluding that it had no legal authority to do so because the State had not shown that the firearm had been used as a firearm. App. at 5-6. Instead, the trial court convicted the respondent of the lesser-included offense of robbery.

The respondent appealed, challenging the State's proof of either aggravated robbery or robbery, the State cross-appealed the trial court's rejection of the aggravated-robbery charge, and the Arkansas Supreme Court initially reversed on the State's cross-appeal. *See* App. at 6-7. It agreed with the State that the trial court had made the factual findings supporting the aggravated-robbery charge, but erroneously held that, under *Smith v. State*, "it

had no legal c[illegible]tutory authority to convict [the respondent] of aggravated robbery because the State failed to prove the element that [the respondent] had employed his firearm as a firearm." App. at 5-6. The Arkansas Supreme Court consequently remanded the case for further proceedings, relying on one of its earlier decisions, which, in turn, relied on decisions from this Court, for the proposition that, when an accused seeks termination of the proceedings on a basis unrelated to factual guilt or innocence, the Double Jeopardy Clause is not offended. *See State v. Zawodniak*, 329 Ark. 179, 185, 946 S.W.2d 936, 939 (1997) (plurality opinion) (quoting *United States v. Scott*, 437 U.S. 82, 98-99 (1978)). *See* App. at 7.

Thereafter, the respondent filed a petition for a writ of certiorari in this Court, which granted the writ, vacated the judgment, and remanded to the Arkansas Supreme Court for further proceedings in light of *Smith v. Massachusetts*, 543 U.S. 462 (2005). *See Carter v. Arkansas*, 126 S. Ct. 65 (2005). On remand, the Arkansas Supreme Court ordered supplemental briefing on the applicability of *Smith*. App. at 8-9.

On February 9, 2006, the Arkansas Supreme Court issued a supplemental opinion reversing its earlier disposition permitting further proceedings, instead holding that *Smith* forbade the respondent's retrial on a charge of aggravated robbery. *See* App. at 16. It agreed that, "[a]t the close of evidence at [the respondent's] criminal trial, the trial judge made factual findings that unquestionably supported the statutory definition of aggravated robbery[;]" specifically, that "while committing a robbery, [the respondent], or an accomplice . . . struck the victim in the head with the butt end of a gun." App. at 11. Nonetheless, the court ruled that *Smith*, foreclosed retrial. App. at 16.

The State timely filed a petition for rehearing, arguing that the Arkansas Supreme Court misread *Smith* and failed to consider this Court's long-standing precedents defining an acquittal, whether based on a legal or a factual ruling, as a judgment of insufficient proof of a factual element of the offense charged. App. at 18-23. The Arkansas Supreme Court denied that petition without comment in a letter order issued on March 16, 2006. App. at 24.

REASONS FOR GRANTING THE WRIT

I. THE ARKANSAS SUPREME COURT ERRED BY CONCLUDING THAT A TRIAL COURT'S ERRONEOUS REJECTION OF A CHARGED OFFENSE WITHOUT RESOLVING AGAINST THE GOVERNMENT ANY FACTUAL ELEMENT OF THE OFFENSE IS AN ACQUITTAL UNDER THE DOUBLE JEOPARDY CLAUSE.

The Arkansas Supreme Court concluded that the Double Jeopardy Clause barred retrial of the respondent for aggravated robbery, despite acknowledging that the trial judge "made factual findings that unquestionably supported the statutory definition of aggravated robbery." App. at 11. Relying on *Smith v. Massachusetts*, the court believed that an erroneous ruling that resolved no factual element of an offense against the government nevertheless amounted to an acquittal, barring retrial in accordance with the Double Jeopardy Clause. The court was wrong. Its conclusion that an erroneous legal ruling resolving no factual elements of an offense against the government is an acquittal is flatly contrary to controlling precedent from this Court. The court's belief that its decision advanced the Clause's purposes also is mistaken; its decision instead

provides a windfall to the respondent vindicating no purpose of the Clause. Consequently, this Court should grant the petition for a writ of certiorari and summarily reverse.

1. The Double Jeopardy Clause forbids, *inter alia*, a successive prosecution after an accused has been acquitted of an offense. *E.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Apart from a "not guilty" verdict, this Court consistently has held that an acquittal occurs only when a "ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the *factual elements* of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (emphasis added); *accord Smalis v. Pennsylvania*, 476 U.S. 140, 144-46 (1986); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984); *Sanabria v. United States*, 437 U.S. 54, 71 (1978); *Burks v. United States*, 437 U.S. 1, 10 (1978). The definition of acquittal, set forth in *Martin Linen*, has remained unchanged, even by this Court's recent decision in *Smith*, upon which the Arkansas Supreme Court relied.

Smith did not dictate the ruling of the Arkansas Supreme Court. *Smith* concerned a trial judge's mid-trial ruling that the government's case had failed on an essential factual element of an offense for which Smith stood trial – that he possessed a firearm with a barrel of less than 16 inches in length. *Smith*, 543 U.S. at 465. That, as the Court noted, was an element of the offense as defined by the legislative body in the Commonwealth of Massachusetts. *Id.*, 543 U.S. at 464. The Court concluded that, despite the fact that the trial judge's assessment on the sufficiency of the evidence supporting that element may have been legally wrong, it nonetheless represented "a

resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.*, 543 U.S. at 467-68 (internal quotation marks and citation omitted). The Court noted that submitting the charge to the jury after that erroneous resolution, an acquittal, was contrary to the Double Jeopardy Clause because it subjected Smith to further fact finding related to his guilt or innocence. *Id.* at 467.

The flaw in the Arkansas Supreme Court's interpretation of *Smith* and the meaning of acquittal is plain. While the court correctly noted that an acquittal may occur based on an incorrect ruling, whether factual or legal, as in *Smith*, it nonetheless failed to heed the remainder of the *Martin Linen* definition of acquittal, which speaks to rulings on the *elements* of an offense. Rather than adhering to the authorities defining acquittal as the resolution, correct or not, of one or more of the *factual* elements of an offense, the Arkansas court concluded that an acquittal also occurs as to the resolution of a fact that is *not* an element of the offense. The court failed to recognize that pivotal distinction from *Smith*. Unlike the trial court there, the trial court here did not resolve any of the factual elements of the offense of aggravated robbery against the State, but erroneously concluded that it could not convict the respondent of that offense without proof of another fact – that the firearm had been used as a firearm – which is *not* an element of the offense. The relevant elements of aggravated robbery are simply the commission of a robbery when armed with a deadly weapon or by the infliction of serious physical injury, *see* Ark. Code Ann. § 5-12-103(a), which elements the Arkansas Supreme Court recognized were met and supported by the trial court's factual findings. App. at 5, 11.

Nevertheless, under the Arkansas Supreme Court's definition of an acquittal employed in this case, a defendant may be acquitted of an offense by any erroneous ruling as to the offense, without respect to the resolution of its factual elements. For example, a trial court, although otherwise satisfied of the adequacy of proof of the statutory elements of an offense, could erroneously conclude that the State failed to prove that it took place on a Tuesday and thereby shield a defendant from judgment at a bench trial or from submission of the case to a jury. The Double Jeopardy Clause does not require the State to face such a no-win situation without recourse to pursue further proceedings on the erstwhile proof of the offense. The Arkansas Supreme Court's decision admitting of such results contradicts this Court's authorities on what constitutes an acquittal and calls for summary action to correct it.

2. The conclusion that an acquittal occurs without the resolution against the government of any of tl factual elements of an offense is inconsistent with other criminal-law principles. Indeed, many of an accused's trial rights are directly tied to the factual elements of an offense. An accused's criminal liability itself, for example, depends upon proof of the elements of an offense as defined by the pertinent legislative body. Those elements are prescribed by the legislature and are the only facts upon which criminal liability may be imposed. *Cf. Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (rejecting suggestion that decision restricted "the ability of legislatures to identify the conduct they wish to characterize as criminal or to define the facts whose proof is essential to the establishment of criminal liability"). Additionally, an accused has a due-process right to have the government prove each

element of an offense beyond a reasonable doubt, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970), and a Sixth Amendment right to "a jury determination that [he or she] is guilty of every element of the crime with which he [or she] is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (footnote omitted).

The elements of an offense can delineate the scope of constitutional rights. The Court has ruled that a person may be convicted consistently with the Double Jeopardy Clause of more than one offense arising from a single criminal act, as long as the statutes defining those offenses have one or more elements that the other does not. *E.g.*, *Blockburger v. United States*, 284 U.S. 299, 304 (1932). More recently, a plurality of the Court has noted that there is no significant constitutional distinction between elements of an offense for double-jeopardy purposes and for purposes of an accused's Sixth Amendment right to trial by jury. *E.g.*, *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (plurality opinion); *cf. Monge v. California*, 524 U.S. 721, 737 (1998) (Scalia, J., dissenting) ("[T]he Double Jeopardy Clause makes sense only against the backdrop of traditional principles of Anglo-American criminal law [in which] defendants are charged with 'offence[s]' . . . composed of 'elements,' which are factual components that must be proved by the state beyond a reasonable doubt and submitted (if the defendant so desires) to a jury.").

Given that some of an accused's trial rights are tied to the elements of an offense, it follows that the rejection of a charged offense on a fact that does not constitute an element of the offense does not bar further proceedings on the offense once proven. The government, after all, bears no burden of proof as to facts that are not elements of an

offense as defined by the appropriate legislative body. The rejection of a charged offense resting on a judicial determination that the government's proof failed as to a fact that is not an element of an offense is more akin to dismissal in the preindictment-delay circumstances of *United States v. Scott*, 437 U.S. 82 (1978). There, the Court explained that the Double Jeopardy Clause does not bar further proceedings when a purported acquittal is based "on grounds unrelated to guilt or innocence[,]" but on "a legal claim that the Government's case against [the defendant] must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *Id.* at 96. For, in such cases, an accused has "suffer[ed] no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant." *Id.* at 99.

Indeed, the respondent need not face further fact finding on guilt or innocence by retrial at all, because, as the Arkansas Supreme Court already has concluded, "the trial judge made factual findings that unquestionably supported the statutory definition of aggravated robbery." App. at 11. "Specifically, the trial judge found that while committing a robbery, [the respondent], or an accomplice . . . struck the victim in the head with the butt end of a gun." App. at 11. The Double Jeopardy Clause does not protect the respondent against further proceedings for the entry of a judgment and sentence on those findings already establishing his guilt of the charge of aggravated robbery. In short, the rejection of the charged offense on the basis of a nonexistent "element" following fact finding otherwise establishing the offense was not a resolution related to guilt or innocence. The Court should grant the petition and summarily reverse the Arkansas Supreme

Court's erroneous double-jeopardy ruling. *See Montana v. Hall*, 481 U.S. 400, 404-05 (1987) (per curiam).

CONCLUSION

For the reasons and authorities set forth above, the State of Arkansas respectfully requests that the petition for a writ of certiorari be granted and that the decision of the Arkansas Supreme Court summarily be reversed.

Respectfully submitted,

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SUPREME COURT OF ARKANSAS
No. CR04-164

BRADY CARTER, APPELLANT, VS. STATE OF ARKANSAS, APPELLEE,	Opinion Delivered 1-13-05 AN APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, NO. CR02-2897; HON. TIMOTHY D. FOX, CIRCUIT JUDGE, AFFIRMED IN PART; REVERSED ON STATE'S CROSS-APPEAL AND REMANDED FOR FURTHER PROCEEDINGS.

TOM GLAZE, Associate Justice

Appellant Brady Carter brings this appeal from his convictions of kidnapping, third-degree battery merged with first-degree terroristic threatening, and robbery. Carter argues that, at the bench trial of this case, the trial court erred in denying his motion for directed verdict, claiming the State's evidence fell short in proving these convictions. We hold that the trial court correctly found the evidence sufficient to support the kidnapping and terroristic threatening convictions.

Carter also asserts that the State failed to prove either a robbery or an aggravated robbery conviction. However, the State, in its cross-appeal, contends the trial court misinterpreted this court's holding in *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003), causing the trial court to erroneously reduce Carter's aggravated robbery charge to the lesser included crime of robbery. We grant the

State's cross-appeal because the trial court erred when it concluded *Smith* was legal precedent which required the trial court to reduce the State's aggravated robbery to robbery.

We first address the sufficiency of evidence issues Carter raises, because an appellant's right to freedom from double jeopardy requires a review of the sufficiency of the evidence prior to a review of any asserted trial errors. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). In reviewing the sufficiency of the evidence, this court views the evidence in a light most favorable to the State and considers only the evidence that supports the verdict. *Wilson v. State*, 332 Ark. 7, 962 S.W.2d 805 (1998).

As previously noted, this case was a bench trial, and in such trials, the trial judge is in a superior position to evaluate the witnesses and to weigh their credibility. *Johnson v. State*, 337 Ark. 196, 202, 987 S.W.2d 694, 698 (1999). Moreover, when the defendant takes the stand in his defense and offers his own account of the events, as Carter did here, it is well settled in this state that the factfinder may resolve questions of conflicting testimony and inconsistent evidence, and may choose to believe the State's account of the facts, rather than the defendant's. *Sera v. State*, 341 Ark. 415, 17 S.W.3d 61 (2000).

With these standards in mind, we consider Carter's suggestion that the State failed to prove his kidnapping conviction. In Arkansas, a person commits the offense of kidnapping by intentionally restraining another person

without his or her consent for the purpose of obtaining a ransom or reward, or for any act to be performed or not performed for the person's return or release, or for inflicting physical injury upon them, including engaging in sexual intercourse, deviate sexual activity, or sexual contact. Ark. Code Ann. § 5-11-102(a)(1) and (4) (Repl. 1997). "Restraint without consent" includes "restraint by physical force, threat, or deception[.]" Ark. Code Ann. § 5-11-101(2) (Repl. 1997).

At trial, the State presented the testimony of the victim, Albert McVay, who said that Carter robbed and kidnapped him on March 21, 2002. McVay testified that Carter came to his home with three other individuals, and, after duct-taping his mouth and arms, they forced him at gunpoint to accompany them to Carter's home. McVay further testified that Carter robbed him of $2,040 cash that he had on his person. McVay maintained that Carter and his friends continually beat him from the time he was initially kidnapped until the time he was returned to his home. Although Carter eventually returned McVay to his home, McVay averred that before Carter left, he threatened to kill both McVay and his girlfriend, Stephanie Childress, who was not home when Carter and his friends confronted McVay. Carter also threatened to blow up McVay and Stephanie's house if McVay failed to return with $2,000 more to Carter's house by 8:00 a.m. the next day. Clearly, the evidence presented by the State supports the kidnapping conviction.

Carter next questions the State's evidence that resulted in his first-degree terroristic threatening conviction. Arkansas Code Annotated § 5-13-301 (Repl. 1997) provides that a person commits the offense of terroristic threatening if, with the purpose of terrorizing another person, he

threatens to cause the death or serious physical injury or substantial property damage to another person. On this point, Carter simply argues that the evidence against him was "highly suspect."

In short, Carter challenges the veracity of the victim, McVay; however, as previously stated, a witness's credibility is a question of fact for the trial court. *Johnson, supra.* Moreover, there was sufficient evidence presented at trial that Carter threatened to kill both McVay and Stephanie and to blow up their house if McVay did not later return to Carter's home with more money. Because the trial judge was in the superior position to weigh the credibility of the evidence, Carter's conviction for first-degree terroristic threatening is affirmed.

In his third point, Carter first asserts that the State failed to prove him guilty of either robbery or aggravated robbery. His contention on this point is without merit, because the State presented sufficient evidence to prove either offense. Under Ark. Code Ann. § 5-12-102(a) (Repl. 1997), a person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ or threaten physical force upon another. Aggravated robbery, on the other hand, occurs when a person commits a robbery while "armed with a deadly weapon" or if the assailant "represents by word or conduct that he is so armed or inflicts or attempts to inflict death or serious physical injury upon another person." *See* Ark. Code Ann. § 5-12-103(a) (Repl. 1997).

Carter offered testimony and evidence at trial that conflicted with the State's evidence. However, we review the evidence in a light most favorable to the State and

consider only the evidence that supports the verdict. *Jordan v. State*, 356 Ark. 248, 254, 147 S.W.3d 691, 694 (2004); *Wilson v. State, supra*. As discussed above, McVay testified that Carter and his friends came to McVay's residence, and, after duct-taping his mouth and arms, they forced him at gunpoint to accompany them to Carter's home. Carter then took $2,040 cash that McVay had on his person. McVay maintained at trial that Carter and his friends continually beat him from the time they kidnapped him and until they returned him to his home. Before leaving, Carter threatened to kill both McVay and Stephanie and to blow up their home unless McVay returned to Carter's home the next morning with $2,000 or more. After Carter left, McVay phoned the police to give them his account of what occurred. At trial, Officer J.P. Marriet, who investigated McVay's report of events, testified that, although Carter did not admit to any of the other charges, Carter admitted to having beaten McVay. In addition, Stephanie and another friend, Stevie Owens, testified that, although they were not present when McVay was kidnapped, they did see McVay after he was returned to his house; he was wet, burned, bruised, bleeding, and scared.

Based on the foregoing evidence, the trial court specifically found that it believed McVay's story that a gun was utilized during this criminal episode, and also found "there's no question that blows to [McVay's] face and [his] head, together with the abrasions and burn marks . . . constituted serious physical injury." Although the trial court made these factual findings that supported the aggravated robbery charge, it cited this court's recent decision of *Smith v. State, supra*, for the proposition that to prove aggravated robbery, the State was required to

show the "gun" was used as a gun, and not as a club. The trial court held that, under *Smith*, it had no legal or statutory authority to convict Carter of aggravated robbery because the State failed to prove the element that Carter had employed his firearm as a firearm. We agree with the issue raised by the State on cross-appeal, namely, that the trial court erred in its interpretation and application of the rule of law established in *Smith*.

In *Smith*, the defendant was charged with the crime of *first-degree battery* under § 5-13-207(a)(1) and (7) (Repl. 1997). In the present case, Carter was charged with *aggravated robbery*, a crime which contains different statutory elements. To prove first-degree battery under § 5-13-207, the State must show the defendant had both the intent to cause physical injury to another person by means of a firearm and that such injury resulted. In the *Smith* case, this court had to determine whether the striking of a person with the butt of a pistol constituted *first-degree battery*; the State's *robbery* statutes were not involved in *Smith*. By way of contrast, this case involves the aggravated robbery statute. In order to obtain a conviction for aggravated robbery, the State did not need to show that a deadly weapon was actually used upon McVay, but only that Carter either was armed or represented that he was armed when he threatened to harm McVay. Consequently, the aggravated robbery was complete when physical force was *threatened*. *See Williams v. State*, 351 Ark. 215, 225, 91 S.W.3d 54, 60 (2002). Therefore, the trial court's application of *Smith* to the present matter was erroneous. The State presented evidence that unquestionably showed that Carter employed or threatened to employ physical force while he was armed with a deadly weapon. *See* §§ 5-12-103(a) and 5-12-102(a).

For the above reasons, we affirm Carter's convictions on the sufficiency of the evidence; however, we reverse and remand the robbery conviction for further proceedings. *See State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997) (when a trial judge makes an error of law rather than an error of fact, double jeopardy is not implicated).

Brady CARTER, Appellant, v.
STATE of Arkansas, Appellee
CR 04-164
Supreme Court of Arkansas
Opinion Delivered November 18, 2005

On remand from the United States Supreme Court, Rebriefing Ordered.

PER CURIAM.

On January 1, 2005, this court affirmed Brady Carter's convictions for kidnapping and third-degree battery; in the same decision, this court reversed on the State's cross-appeal, holding that the trial court erroneously reduced Carter's aggravated robbery charge to the lesser included crime of robbery. In doing so, this court remanded the robbery charge for further proceedings. *See Carter v. State*, ___ Ark ___, ___ S.W.3d ___, (January 1, 2005). The decision to remand the robbery charge was based, in part, on *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d. 936 (1997), in which this court held that, when a trial judge makes an error of law rather than an error of fact, double jeopardy is not implicated.

Carter filed a petition for writ of certiorari and a motion for leave to proceed *in forma pauperis* to United States Supreme Court, both of which were granted. The Supreme Court vacated this court's original judgment and remanded the case for further consideration in light of *Smith v. Massachusetts*, 543 U.S. ___, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005). We now direct the parties to rebrief the sole issue of whether this court's decision to remand Carter's robbery charge was in violation of his constitutional rights against double jeopardy. Specifically, in accordance with the Supreme Court's opinion, we ask the

parties to address the impact of *Smith v. Massachusetts, supra.*

It is only fair that the parties should be given an opportunity to present their opinions in this matter by allowing the lawyers to be zealous advocates on behalf of their clients and not mere bystanders. For this reason, rebriefing is ordered. In order to expedite this matter, the State will be required to submit its brief on or before December 18, 2005. Carter's brief will be due no later than twenty days after the State's brief is filed.

SUPREME COURT OF ARKANSAS
No. CR04-164

BRADY CARTER, APPELLANT, v. STATE OF ARKANSAS, APPELLEE.	Opinion Delivered 02-09-06 ON REMAND FROM THE UNITED STATES SUPREME COURT AFFIRMED IN PART, REVERSED AND REMANDED IN PART

Tom Glaze, Associate Justice

This case, which involves a question of double jeopardy, is being considered on remand from the United States Supreme Court. The brief history is as follows. In *Carter v. State*, ___ Ark ___, ___ S.W.3d ___ (January 1, 2005) (*Carter I*), this court affirmed Brady Carter's convictions for kidnapping and third-degree battery; in the same decision, this court reversed on the State's cross-appeal, holding that the trial court erroneously reduced Carter's aggravated robbery charge to the lesser included crime of robbery. In doing so, this court remanded the robbery charge for further proceedings. The decision to remand the robbery charge was based, in part, on *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), in which this court held that, when a trial judge makes an error of law rather than an error of fact, double jeopardy is not implicated.

Carter filed a petition for writ of certiorari to the United States Supreme Court, which that Court granted. The Supreme Court vacated this court's original judgment and remanded the case for further consideration in light of *Smith v. Massachusetts*, 543 U.S. ___, 125 S.Ct. 1129

(2005), a 5-4 decision. This procedure is commonly referred to as a "GVR."[1] Pursuant to the mandate from the Supreme Court, we now reevaluate our decision in *Carter I* in light of *Smith v. Massachusetts, supra*.[2]

The following is a brief background of the relevant facts presented in *Carter I*. At the close of evidence at Carter's criminal trial, the trial judge made factual findings that unquestionably supported the statutory definition of aggravated robbery. *See* Ark. Code Ann. § 5-12-103 (Repl. 1997). Specifically, the trial judge found that while committing a robbery, Carter, or an accomplice of Carter, struck the victim in the head with the butt end of a gun. The trial judge then misinterpreted this court's decision in *Smith v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003), and found that, in order to prove aggravated robbery, the State was required to show that the "gun" was used as a gun, and not as a club. As we said in *Carter I*, this was an incorrect statement of the law. Relying on this legal error,

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[1] "GVR" is an acronym standing for "grant certiorari, vacate the judgment below, and remand the case." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163 (1996). The Supreme Court has stated that a GVR is appropriate under the following circumstances:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Chater, supra.

[2] As an initial matter, we note that Brady Carter's convictions for kidnapping and third-degree battery were properly affirmed in *Carter I* on independent state law grounds; consequently, these convictions are not at issue in this proceeding.

the trial judge incorrectly dismissed Carter's aggravated robbery charge and convicted him of the lesser crime of robbery. On appeal, this court reversed Carter's robbery conviction and remanded the case so that Carter could be retried for aggravated robbery.

As mentioned above, the *Carter I* court based its decision on *State v. Zawodniak, supra*. In *Zawodniak*, the defendant was charged with simultaneous-possession of drugs and firearms. *See* Ark. Code Ann. § 5-74-106(a) (Repl 1993). Zawodniak moved for a directed verdict at the close of the State's case, arguing that the State had failed to prove the necessary elements of the charge against him. Specifically, Zawodniak claimed that the simultaneous possession statute required a showing that, in addition to proving he was in the simultaneous possession of drugs and a firearm, Zawodniak was also involved in criminal gang or group activity. *Zawodniak*, 329 Ark. at 181. The trial court agreed with this erroneous interpretation of the statute and granted Zawodniak's motion. Zawodniak's charges were reduced to possession of a controlled substance and possession of drug paraphernalia, and he was eventually convicted.

On appeal, the *Zawodniak* court vacated the conviction and remanded the case for a retrial on the simultaneous possession charge. In doing so, our court held as follows:

> Zawodniak received a favorable trial court decision not because the State had failed to prove its case, but because the trial court, at Zawodniak's instigation, erred in applying erroneous law. In other words, defendant Zawodniak, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual

> guilt or innocence of the simultaneous-possession charge of which he was accused, suffers no injury cognizable under the Double Jeopardy Clause.

Zawodniak, 329 Ark. at 185 (*citing United States v. Scott*, 437 U.S. 82, 98-99 (1978)).

In *United States v. Scott*, on which the *Zawodniak* court relied, the defendant, John Scott, moved for dismissal of two counts of narcotics distribution based on a preindictment delay by the prosecution. At the close of all the evidence, the trial court granted Scott's motion. *Scott*, 437 U.S. at 82. On appeal by the government, the Supreme Court reversed the trial court's decision and remanded the case to be retried. The Supreme Court explained that double jeopardy concerns are not offended under circumstances where dismissal is based on matters unrelated to guilt or innocence, writing as follows:

> This is scarcely a picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

Scott, 437 U.S. at 98-99; *see also Zawodniak*, 329 Ark. at 185.

The relevant question in the current case is whether *Scott*, *Zawodniak*, and consequently, *Carter I*, have been

affected by the Supreme Court's recent decision in *Smith v. Massachusetts, supra*; it appears that they have.

In *Smith v. Massachusetts*, the defendant Melvin Smith was charged with three counts, one of which was assault and battery by means of a dangerous weapon. At the close of the prosecution's case, Smith moved to dismiss the dangerous-weapon charge, claiming that the evidence was insufficient as a matter of law. *Smith*, 125 S.Ct. at 113. The trial judge granted the motion, finding that the State had not presented evidence to prove that the firearm used was shorter than 16 inches, a requisite element of the crime. *Id.* The trial continued as to the other charges, and Smith presented his case in defense. At the close of all the evidence, the prosecutor located a precedent holding that the victim's descriptive testimony was sufficient to prove the barrel-length requirement. *Id.* The trial judge agreed and reversed her previous ruling. The firearm count went to the jury, and Smith was eventually convicted on all counts. *Id.*

On appeal, the Supreme Court held that the trial judge's original ruling was an acquittal because it "actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith*, 125 S.Ct at 1134. Moreover, the *Smith* Court held that the trial judge's subsequent reversal violated Smith's rights against double jeopardy. The *Smith* opinion contains statements of law that directly impact our decision in *Carter I*:

> Massachusetts' characterization of the required finding of not guilty as a legal rather than factual determination is, "as a matter of double jeopardy law . . . not binding on us." What matters is that, as the Massachusetts rules authorize, the judge

> "evaluated the [Commonwealth's] evidence and determined that it was legally insufficient to sustain a conviction."

Smith, 125 S.Ct. at 1135 (*citing Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977)).

The State contends that *Smith* is distinguishable from the present case, stating that, unlike in *Smith*, where the trial judge ruled that proof of a *required* element of the charged offense was lacking, here, the State was required to prove an *additional* element that the statute does not require. In short, the State argues that Carter was never "acquitted" for double jeopardy purposes. We cannot agree.

To begin with, the Supreme Court's definition of "acquittal" in *Smith*, only requires a "resolution, *correct or not*, of some or all of the factual elements of the offense charged." *Smith*, 125 S.Ct at 1134 (emphasis added); *see also United States v. Scott*, 437 U.S. 82, 91 (1978) (holding that an "acquittal" may be based on a ruling by the court, *however mistaken*, that the evidence is insufficient to convict (emphasis added)). In addition, the State has failed to cite a single case distinguishing between a *required* element and an *additional* element for double jeopardy purposes.

Finally, the *Smith* Court states that double jeopardy does not provide an exception for any legal errors:

> But any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well established rule that the bar will attach to a preverdict acquittal that is patently wrong in law.

Id. at 1137 (citations omitted). In a footnote to this statement, the Court elaborated as follows:

> The dissent goes to great lengths to establish that there was no prejudice here, since the acquittal was legally wrong, and the defendant was deprived of no available defense. But the Double Jeopardy Clause has never required prejudice beyond the very exposure to a second jeopardy. To put it differently: requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause – even when the acquittal was erroneous because the evidence was sufficient.

Id. at 1137, fn7 (citations omitted). Regardless of the legal error made in the present case, the trial judge determined that there was a lack of evidence on the aggravated robbery charge and acquitted Carter of that charge. According to *Smith*, a defendant cannot be retried on the same charge, regardless of whether the defendant's acquittal was a result of the trial judge's legal error. *Smith, supra.*

The double jeopardy clause guarantees that the State shall not be permitted to make repeated attempts to convict the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957). In accordance with the Court's *Smith* decision, it appears that the purpose of the double jeopardy clause will be served by preventing the retrial of Carter's aggravated robbery charge.

This court's decisions in *Zawodniak* and *Carter I* are in direct conflict with the Supreme Court's decision in *Smith*.[3] Consequently, the State's cross-appeal, challenging Carter's acquittal for aggravated robbery, is denied. In addition, Carter's convictions for robbery, kidnapping, and third-degree battery are affirmed. This case is remanded for a ruling consistent with this opinion.

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[3] The Supreme Court's decision in *Scott* does not appear to be in conflict with *Smith*, but rather distinguishable on its facts. The dismissal in the *Scott* case was based on pretrial delay, or as the Court described it, "matters unrelated to guilt or innocence." As a result, double jeopardy principles were not offended and a retrial can occur. Despite the legal error in *Smith*, the Court determined that the dismissal was based on matters of guilt or innocence; consequently, double jeopardy prevents retrial.

IN THE ARKANSAS SUPREME COURT

BRADY CARTER

CROSS-APPELLEE/RESPONDENT

VS. **NO. CR 04-164**

STATE OF ARKANSAS

CROSS-APPELLANT/PETITIONER

PETITION FOR REHEARING

(Filed Feb. 27, 2006)

Comes now the Petitioner, State of Arkansas, by and through Mike Beebe, Arkansas Attorney General, and Clayton K. Hodges, Assistant Attorney General, and for its Petition for Rehearing states:

I.

In an opinion delivered February 9, 2005, this Court, on remand from the Supreme Court of the United States, reversed its earlier disposition of the State's cross-appeal, in which it reversed and remanded Respondent's purposed acquittal of aggravated robbery and held that the trial court erred by requiring the State to prove that a defendant used a firearm as a firearm in order to be guilty of aggravated rob ery. *Carter v. State*, CR 04-164, slip op. (Ark., Feb. 9, 2006) ("Carter II"). The opinion contains an error of law, and for reasons to follow, this Court should grant rehearing and reinstate its earlier holding.

II.

In concluding that a remand for a new trial on the offense of aggravated robbery was unavailable, this Court held that *Smith v. Massachusetts*, 543 U.S. 462 (2005),

forbade a remand because the trial court's decision constituted "a resolution, *correct or not*, of some or all of the factual elements of the offense charged." *Carter II*, slip op. at 6 (emphasis in original). While in Carter II this Court emphasized the language from *Smith* "correct or not," the Court failed to adequately consider the remainder of the quoted language, "some or all of the factual elements of the offense charged." The failure to do so is legal error warranting rehearing because the *Carter II* opinion is flatly contrary to controlling precedent from the Supreme Court of the United States.

III.

Even in *Carter II*, this Court did not retreat from its earlier holding that the trial court's ruling was in error.[1] In *Carter v. State*, No. CR 04-164, slip op. at 6 (Ark., Jan. 15, 2005) ("Carter I"), this Court agreed with the State that "that the trial court erred in its interpretation and application of the rule of law established in *Smith* [*v. State*, 352 Ark. 92, 98 S.W.3d 433 (2003)]." Specifically, this Court held that, in a prosecution for aggravated robbery, the State is not required to present proof that an accused who employed a firearm used it as a firearm, particularly in light of the statutory elements of the crime of aggravated robbery and cases from this Court explaining what proof of

[1] As of the date that this petition is filed, Respondent's motion to correct this Court's February 9, 2006, opinion is pending, in which Respondent seeks to have this Court change the disposition of the case to "affirmed in all respects." As stated in the State's response to that petition, this Court's supplemental opinion on remand from the Supreme Court of the United States did not change the holding that the trial court's ruling was error, but rather, it simply held that the double-jeopardy clause forbade further proceedings.

that element suffices to sustain a conviction. *See Carter I*, slip op. at 6.

IV.

Nonetheless, the Double Jeopardy Clause never has been interpreted to apply to a case like this, in which a ruling is made on an issue that is not a "factual element of the offense charged." Certainly, none of the United States Supreme Court cases upon which this Court relied in *Carter II* support the proposition that this type of legal ruling nonetheless constitutes an acquittal. While this Court faulted the State for failing "to cite a single case distinguishing between a *required* element and an *additional* element for double jeopardy purposes," *Carter II*, slip op. at 6, all of the State's cases supported its position. Indeed, if any on-point authority existed, the State certainly would have cited to it, but its research revealed *no instance*, until now, in which a court concluded that a defendant's receiving a favorable ruling concerning proof of an element, not required by law, inured to his or her benefit and insulated him or her from further proceedings.

That this case does not present a double-jeopardy problem. *Smith v. Massachusetts* itself indicates as much. At issue in *Smith* was not whether the trial court's interpretation of the elements the prosecution must prove was correct but whether its legal determination that the evidence was insufficient on a required element was an acquittal. An incorrect interpretation of the factual evidence as applied to a required element is what was at issue in Smith. In fact, the Court seems to assumed as much by noting that, as to the pending charge of unlawful possession of a firearm under Massachusetts law, "The 'firearm' element

. . . requires proof that the weapon had a barrel 'less than 16 inches' in length." *Smith*, 543 U.S. at 464. The bulk of *Smith* concerned whether the fact that the determination that the evidence of that required element was legally insufficient constituted a "legal" or "factual" determination. The Supreme Court of the United States ultimately held it did not matter because the trial judge's ruling actually was "a resolution, correct or not, of some or all of the *factual elements of the offense charged.*" *Smith*, 543 U.S. at 468 (emphasis added).

Other cases cited to this Court, and relied upon by this Court, hold similarly. For instance, this Court cited to *United States v. Scott*, 437 U.S. 82, 91 (1978), for the proposition that "an 'acquittal' may be based on a ruling by the court, *however mistaken*, that the evidence is insufficient to acquit." *Carter II*, slip op. at 6 (emphasis in original). *Scott*, however, does not support the proposition for which this case stands. Indeed the double-jeopardy clause was not applied in *Scott* since Scott had sought termination of the proceedings on a ground "not related to factual guilt or innocence." *Scott*, 437 U.S. at 92. While *Scott* speaks to the applicability of the double-jeopardy clause as to a mistaken legal determination that the evidence is legally insufficient to convict, it in no way diminishes the fact that its determination was made as to one or more elements of the crime or crimes charged.

The seminal case of *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), controls the disposition of this case. That case established what constituted an acquittal for double-jeopardy purposes, a definition that remains unchanged by *Smith* – "a resolution, correct or not, of some or all of the *factual elements* of the offense charged." *Id.*, 430 U.S. at 571 (emphasis added). There,

the crucial determination necessarily required an inquiry into the factual elements required by statute. If a determination is made, either by the jury or by the court in the form of a finding that the evidence supporting that element is legally insufficient to convict, *see generally Smalis v. Pennsylvania*, 476 U.S. 140 (1986), then the accused has been acquitted. If not, the accused has not been acquitted.

V.

Therefore, the Court's opinion in *Carter II* is legal error. As *Carter I* makes clear, the trial court's ruling was based on the lack of proof of an element that the General Assembly did not require. That ruling does not constitute an acquittal under the well-established standards set forth by the Supreme Court of the United States. Significantly, the lack of proof of an element not required by statute is not a factor relating to guilt or innocence. Only the legislature, not a trial judge, can determine the elements of a crime, and if those statutory elements are proven, then a finding that a fact *not required by statute* has not been proven is legally insignificant for double-jeopardy purposes. The Court's holding is flatly contrary to controlling precedent from the Supreme Court of the United States, and, hence, constitutes legal error warranting rehearing. Simply stated, Respondent was not acquitted of aggravated robbery, under any of the definitions of acquittal established by the Supreme Court of the United States. This Court's contrary determination is legal error, and, thus, this Court should grant rehearing, reinstate its original holding, and remand for further proceedings.

WHEREFORE, Petitioner respectfully requests that this Court grant its petition, reinstate its original holding, and remand for further proceedings.

Respectfully submitted,

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RE: CR 04 00164. Brady Carter v. State of Arkansas

Dear Attorneys:

The Arkansas Supreme Court made the following orders today in the above styled case:

"Petition for rehearing is denied."

"Appellant's motion for correction of opinion is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko

cc: Pat O'Brien, Clerk
(CR 02-2897)

ORIGINAL (3)

Supreme Court, U.S.
FILED
JUL 11 2006
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2005 TERM

STATE OF ARKANSAS — PETITIONER

V. — 05-1587

BRADY CARTER — RESPONDENT

CARTER'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED

The question as framed by the State ["*Does a trial court's erroneous rejection of a charged offense without resolving against the government any of the factual elements of the offense constitute an acquittal under the Double Jeopardy Clause?*"] erroneously characterizes what happened in this case. The trial court did resolve the factual elements.

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CITATION TO OPINION BELOW

The decision for which the State seeks certiorari is *Carter v. State*, ___ Ark. ___, ___S.W.3d ___, 2006 WL 301077 [*Carter II*]. The original decision in this case was *Carter v. State*, 360 Ark. 266, ___S.W.3d ___ 2005 WL 74083 [*Carter I*].

JURISDICTIONAL STATEMENT

Carter has no objection to the Court's jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.....

Fourteenth Amendment, United States Constitution:

....nor shall any state deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

Brady Carter was charged in the Circuit Court of Pulaski County, Arkansas with the offenses of Kidnapping, Aggravated Robbery, Terroristic Threatening in the First Degree and Battery in the Third Degree. A jury trial was waived.

In the nonjury trial, Circuit Judge Timothy D. Fox convicted Carter of Kidnapping, Terroristic Threatening and Battery, merging the misdemeanor battery into the Terroristic Threatening charge. On the Aggravated Robbery, Ark. Code Ann. § 5-12-103, charge – a Class Y felony with a penalty range of 10 to 40 years or life, with a requirement of service of 70 percent before parole eligibility— the judge reduced the charge to its lesser included offense , Robbery, Ark. Code Ann. § 5-12-102, a Class B felony with a penalty range of 5 to 20 years. Carter was sentenced to 10 years on the kidnapping, six years on the terroristic threatening and three and a half years on the robbery, to run concurrently. Carter has been paroled, but if relief is not granted by this Court, must be resentenced to at least 10 years for Aggravated Robbery and for which, under Arkansas law, he is not eligible for parole until serving seventy percent (70%) thereof.

Carter appealed and the State cross-appealed. The latter's appeal is authorized by Rule 3 of the ARKANSAS RULES OF APPELLATE PROCEDURE—CRIMINAL, which allows appeals by the State involving the " correct

and uniform administration of the criminal law."

The Arkansas Supreme Court held in *Carter I* that the trial court, in convicting Carter of the lesser offense of robbery had misapplied relevant Arkansas precedents.

> For the above reasons, we affirm Carter's convictions on the sufficiency of the evidence; however, we reverse and remand the robbery conviction for further proceedings. See *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997) (when a trial judge makes an error of law rather than an error of fact, double jeopardy is not implicated).

Carter filed a petition for rehearing seeking prohibition of further proceedings due to double jeopardy. The Arkansas court denied the petition without comment other than to cite *Zawodniak*.

Carter sought certiorari in this Court, and this Court granted the writ, vacated and reversed for reconsideration in light of *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005). *Carter v. Arkansas*, 126 S.Ct. 65 (2005). On remand, the Arkansas Supreme Court precluded further proceedings against Carter on double jeopardy grounds. The State seeks certiorari from that decision. Carter opposes that grant.

REASONS NOT TO GRANT THE WRIT

THE ARKANSAS SUPREME COURT'S DECISION IN CARTER II WAS CORRECT. DOUBLE JEOPARDY WOULD BE VIOLATED BY RETRIAL OR RESENTENCING FOR AGGRAVATED ROBBERY. THE TRIAL COURT'S DECISION WAS A RESOLUTION OF THE FACTUAL ALLEGATIONS AGAINST CARTER.

The State of Arkansas' petition for certiorari should be denied. Despite the State's evident straining to find a distinction, the Arkansas Supreme Court's decision upon the remand of *Carter v. State*, --- S.W.3d ----, 2006 WL 301077 (2/9/06). [*Carter II*] is a garden variety application of the Fifth and Fourteenth Amendment double jeopardy principles re-enunciated in *Smith v. Massachusetts*, 543 U.S. 462, 125 S.Ct. 1129 (2005), but having their derivation in several other cases of this Court, most prominently *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349 (1977); *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957); *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671 (1962).

A conviction of a lesser offense of Robbery, as occurred in Carter's case, is an acquittal of the greater offense, in this case Aggravated Robbery. This is established as a matter of constitutional law in *Green* and an explicit provision of Arkansas statutory law. Ark. Code Ann. § 5-1-112(1).[1].

---

[1] Ark. Code Ann. § 5-1-112(1) includes this language: "A determination of guilt of a lesser included offense is an acquittal of the greater inclusive offense,

Assuming, as Carter concedes this Court probably will, that the state trial judge's decision involved an error of Arkansas law,[2] the enduring principle from *Smith*, *Martin Linen*, *Green* and *Fong Foo* is that a not guilty verdict cannot be disturbed on appeal, even if mistaken.

Smith was merely an application of that longstanding principle to an in-trial directed verdict situation. Clearly, what is forbidden to the trial court, as in *Smith*, is forbidden to the appellate court—contrary to what Arkansas tried to do before being asked to reconsider in light of *Smith*.

The State's claim that the trial judge's ruling had nothing to do with resolution of the guilt-innocence determination is specious. The trial judge's decision had everything to do with guilt-innocence. This is what the trial judge said in convicting

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although the conviction is subsequently set aside."

[2] Carter argued on remand to the Arkansas Supreme Court that the trial judge's remarks in reducing the charge were supportable under Arkansas law. Carter was alleged to have been an accomplice. The principal had a weapon. Ark. Code Ann. § 5-2-406, which provides

> When two (2) or more persons are criminally liable for an offense of which there are different degrees, each person shall be liable only for the degree of the offense that is consistent with his own mental culpability or with his own accountability for an aggravating fact or circumstance.

An accomplice not knowing or ratifying the presence of the weapon would be guilty only of the lesser offense.

of the lesser offense:

> I have a problem with the aggravated robbery charge. For the record, I believe there was a gun present. The testimony was that it was used by someone else. That would normally create accomplice liability on the part of the defendant.
>
> The victim testified today, Mr. McVay testified today that he was hit once in the back of the head with the weapon and once in the face. Now Mr. Carter had a difference. He said he slugged the guy in the face with his fist and that that's what happened. There's no question that the blows to the face and the head, together with the other abrasions and burn makers, together constitute serious physical injury. I don't have a problem with that.
>
> I kind of felt about the utilization of that gun, with the butt end of the gun, the same way for the aggravated robbery charge as the Supreme Court explained with respect to the aggravated battery charge that we previously had.
>
> So what I'm going to do is, I'm going to convict the defendant of the lesser-included offense of robbery, which is a Class B felony. If I don't have the authority to do that, then I don't believe the aggravated robbery charge was met in this case because of the facts that I heard today.
>
> If I have the authority to do it, then—I mean, that's what I am doing, but, for the record, in case there's an appeal, the State did not ask or did not reduce it and the defendant did not ask for the lesser included offense.
>
> (Trial Record 277-278)

If that is not a finding on a guilt-innocence issue, it is impossible to imagine what might be. This is simply not a situation such as that recognized in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187 (1978). *Scott* merely held that there was no double jeopardy bar to retrial after a dismissal for matters wholly unrelated to guilt

or innocence. In *Scott*, that was pretrial delay. In *Smith* and in the case at bar, the operative decision—even if mistaken— was clearly about guilt and innocence.

There simply is no basis in fact or law for certiorari to be granted. The State's petition should be denied.

CONCLUSION

Wherefore, Carter prays that this Court deny the State's petition for certiorari.

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Member of Supreme Court Bar

CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have mailed a copy of the foregoing to David Raupp, Assistant Attorney General of Arkansas, 323 Center St., Little Rock, AR 72201 by first class mail this 11 day of July, 2006.

JEFFREY M. ROSENZWEIG

Supreme Court of the United States

No. 05-1587

Arkansas,

Petitioner

v.

Brady Carter

ON PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of Arkansas, No. CR04-164.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Arkansas.

IT IS ORDERED by this Court that the said petition is denied.

October 2, 2006

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

Supreme Court of the United States

No. 05-1587

Arkansas,

Petitioner

v.

Brady Carter

ON CONSIDERATION of the motion of respondent Brady Carter for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion is granted.

October 2, 2006

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By _____
Deputy

(1)

No. 05-1587

Supreme Court U.S.
FILED
JUL 18 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF ARKANSAS,

Petitioner,

v.

BRADY CARTER,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

REPLY BRIEF

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The respondent mistakenly relies on the trial judge's alternative purported acquittal finding to ask the Court to avoid the question presented by the Petition. That purported finding, however, was never a basis on which to conclude there had been a factual acquittal of the respondent on the elements of aggravated robbery, and it is certainly not a basis after the Arkansas Supreme Court declined his invitation to rely on it in that court. It certainly is no basis to reject the question presented by the most recent judgment of the Arkansas Supreme Court, which the Petition seeks to correct.

First, the notion that a trial court can find directly contrary facts as alternatives and avoid review of one of those findings is patently absurd. The respondent's quotation of the trial court's finding illustrates as much. The purported acquittal on which the respondent relies is prefaced by the phrase, "if I don't have authority to do that, then . . . ". Resp. Br. at 10. Thus, the trial judge – after finding the statutory, factual elements of aggravated robbery were met, but erroneously concluding that an additional element (the use of a firearm as firearm) was not – "alternatively" concluded that the statutory elements were not met. But factual findings cannot be found in the alternative. Either the statutory elements were met, as the judge found before making his erroneous ruling about the use of a firearm, or they were not. He could not find contrary facts in the alternative.

Second, the Arkansas Supreme Court did not dispose of this case on the trial judge's alternative purported acquittal. It did not do so in the first case decided in 2005, Pet. at App. 1-7, despite the respondent's reliance on that alternative in that court as a cross-appellee. Finally, the court did not do so in the case the Petition now seeks to

have corrected. In fact, the opinion below expressly states that "the trial judge made factual findings that unquestionably supported the statutory definition of aggravated robbery." Pet. App. at 11. Despite that statement about the findings before it, the court below concluded the respondent was acquitted. It is that settled appellate resolution of this case on which the question is presented – to wit: Does a trial court's erroneous rejection of a charged offense without resolving against the government any of the factual elements of the offense constitute an acquittal under the Double Jeopardy Clause? The Court should grant the writ and summarily reverse the Arkansas Supreme Court's affirmative answer to the question.

Respectfully submitted,

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